

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



ORIGINAL  
**75-2093**

P/38

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IN THE  
**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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NOWELL A. BRATHWAITE,

*Petitioner-Appellant,*

v.

JOHN R. MANSON, Commissioner of Correction of the  
State of Connecticut,

*Respondent-Appellee.*

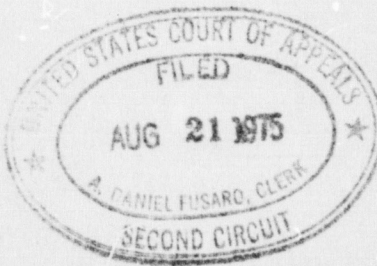
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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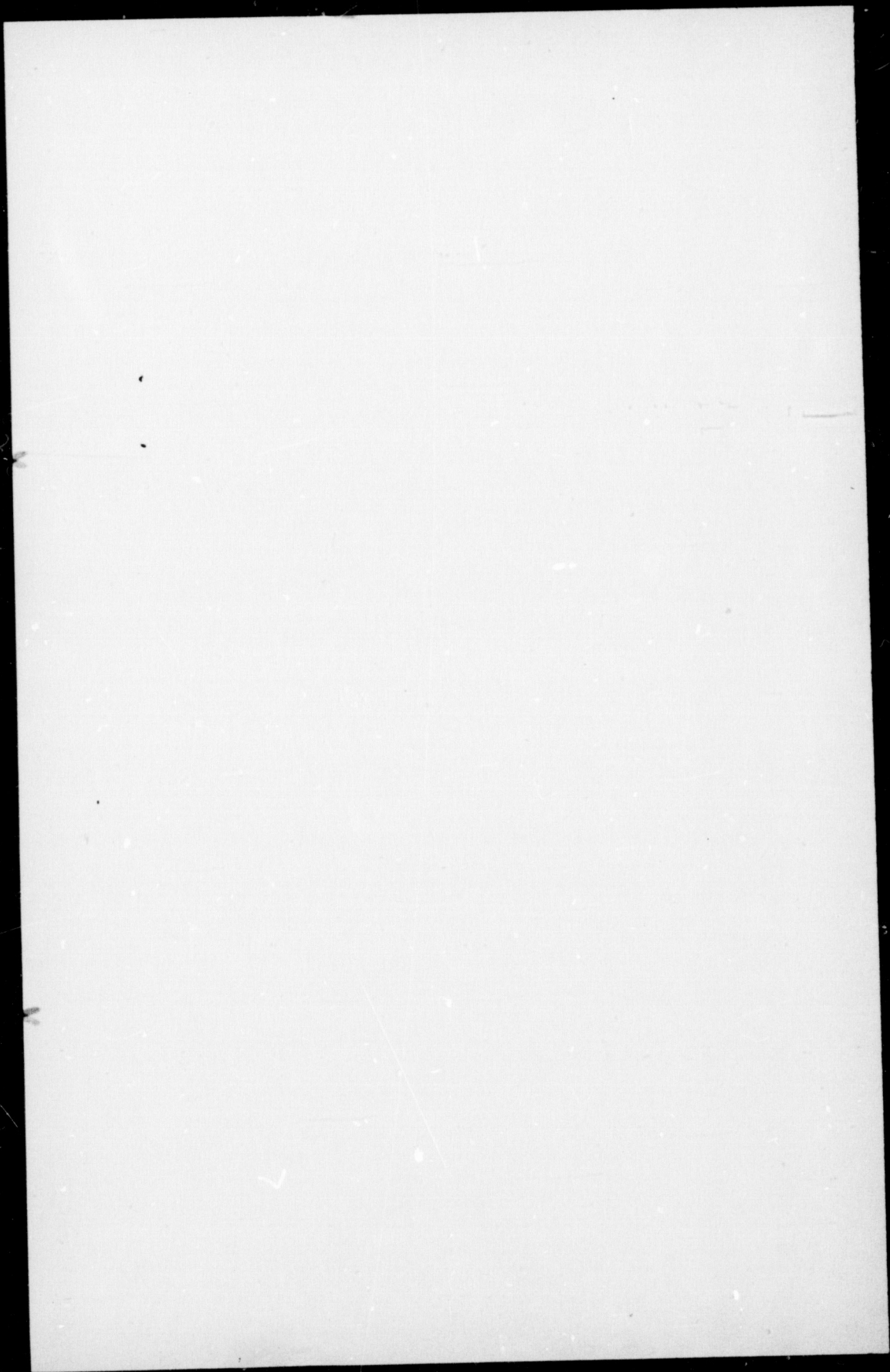
**RESPONDENT-APPELLEE'S BRIEF**

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**RESPONDENT-APPELLEE'S BRIEF**

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**Statement of the Issues**

1. Whether, notwithstanding an impermissibly suggestive photographic identification, the subsequent in-court identification under all of the circumstances was valid?

2. Whether questions as to the quality of representation by the petitioner-appellant's trial counsel should be considered by this Court?



### **Statement of the Case**

On January 14, 1971, a jury of twelve found the petitioner, Nowell Brathwaite, guilty of both counts of an information charging him with the sale and possession of narcotics. On October 28, 1971, Brathwaite's motion to set aside the verdict on the ground that it was contrary to law and the evidence was denied. Thereafter he appealed to the Connecticut Supreme Court which, on April 5, 1973, affirmed his conviction (164 Conn. 617).

On June 28, 1974, Brathwaite filed a writ of habeas corpus in the United States District Court at Hartford based upon a claim that the photographic identification procedure and in-court identification testimony were constitutionally invalid. In a memorandum of decision, dated May 13, 1975, the trial judge (Blumenfeld, J.), dismissed the petition. On May 22, 1975, Brathwaite filed a notice of appeal.

### **Statement of the Facts**

On May 5, 1970, at about 7:45 P.M., Jimmy D. Glover, an undercover State Police Officer, and an informant went to a third floor apartment at No. 201 Westland Street, Hartford, to purchase narcotics from a suspected seller. Tr. pp. 23-25. After he knocked the door opened twelve to eighteen inches and Glover observed a male standing in front of a female inside the apartment. Tr. pp. 28, 29. It was not dark, there was natural light coming from the outside through the windows into the hallway, and Glover had no difficulty seeing. Tr. pp. 27, 28. After the informant identified himself, Glover asked the male for some narcotics. This person asked Glover to repeat his request and, when he did, the person held out his hand and Glover handed him two \$10 bills. Two or three minutes elapsed before the door closed. Tr. pp. 29-31. After a few moments the

door reopened and the same male person placed two glassine bags from his left hand into Glover's hand before the door closed again. Tr. pp. 30, 31. From the time it opened until the door closed a second time five to seven minutes elapsed. Tr. p. 33. During the entire period the door was open there was light coming from within the apartment and Glover stood within two feet of the person from whom he made the purchase while looking at his face. Tr. pp. 30-33. During the time of the sale Detective Michael D'Onofrio of the Hartford Police Department was stationed outside the building acting as a covering officer for Glover. Tr. pp. 58-60. Later the same evening Glover, who did not know his seller by name, described him to D'Onofrio as being a dark-complexioned black male, approximately five feet eleven inches tall, heavy build, black hair in an Afro style, with high cheek bones, wearing blue pants and a plaid shirt. Tr. pp. 36, 37. D'Onofrio who recognized the description given as that of Nowell Brathwaite obtained a photograph of Brathwaite and he dropped the photograph off at State Police Headquarters. Tr. pp. 63-65. Two days after the sale while at headquarters Glover looked at the photograph and identified the person shown as the same person from whom he had purchased the narcotics. Tr. pp. 36-38.

Brathwaite was placed under arrest in August 1970. His arrest took place at a third floor apartment at No. 201 Westland Street, Hartford, where Brathwaite was visiting a Mrs. Ramsey, who was a friend of his wife. Tr. pp. 121, 122. The petitioner admitted that he had visited this apartment "lots of times" prior to the date of the offense. Tr. pp. 112, 113.

On January 8, 1971, during the trial of the case, the photograph from which Glover had identified Brathwaite was received in evidence without objection. Tr. p. 38. Glover, who had not seen the petitioner since the date of the sale (Tr. p. 41), testified unequivocally ("There is no

question whatsoever") that the person shown in the photograph was the same person from whom he had made the purchase. Tr. p. 38. Glover, also without objection, made a positive in-court identification of the petitioner. Tr. p. 38.

## ARGUMENT

### I

**The identification of the petitioner and in-court testimony thereof did not violate due process.**

Although the resort by police to the photographic identification of suspected criminals is an accepted investigatory procedure [*Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed.2d 1247 (1968)], the respondent concedes that the initial identification of the petitioner was made from a single photograph and that resort to such practice has been deemed to be impermissibly suggestive by this circuit.

*United States ex rel. John (Armstrong) v. Casscles*, 489 F.2d 20, 24 (2nd Cir. 1973) cert. den. 416 U.S. 959;

*United States ex rel. Gonzalez v. Zelker*, 477 F.2d 797, 801 (2nd Cir. 1973) cert. den. 414 U.S. 924.

It should be noted, however, that the photograph was obtained by Detective D'Onofrio on the basis of a rather complete description given to him by Officer Glover (skin color and pigmentation, height, build, color of hair and hair style, outstanding facial characteristic, and clothing). D'Onofrio recognized the description as being that of Brathwaite whom he had seen on prior occasions, and he left the photograph on Glover's desk. There is no evidence that D'Onofrio was present or that any sort of influence or pressure was exerted on Glover to make the identification which he made not more than two days after the offense.



Conceding, then, that the photographic procedure was impermissibly suggestive (though not unnecessarily so; see *United States ex rel. John (Armstrong) v. Casscles, supra*), it cannot be assumed, as the Supreme Court has said [*Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed.2d 401 (1972)], "in every instance that admission of such confrontation offends due process." It is the totality of the circumstances which must control.

"Precedent is of little value in cases such as this, each of which must be decided on its own facts." *United States ex rel. Gonzalez v. Zelker, supra*.

Specifically, the Supreme Court has said (*Biggers*, pp. 199-200) that the factors to be considered in evaluating the likelihood of misidentification include "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

It is respectfully submitted that an application of the facts and circumstances of the instant case to the *Biggers* guidelines meets the requirements of due process.

#### **A. The *Neil v. Biggers* standards:**

##### **1. Opportunity to view petitioner at time of crime.**

Glover testified that for a period of not less than two to three minutes he stood within two feet of Brathwaite while looking at his face. This in itself compares favorably with the long (3 to 5 minutes) and intense view recently deemed reliable by this Court. *United States v. Boston*, 508 F.2d 1171, 1173, 1178 (2nd Cir. 1974). Glover further testified that there was light both in the hallway and inside the apartment and he had no difficulty at any time in seeing his seller.



Certainly the opportunity to view the subject was far superior to the brief, "real good look" . . . "in the car lights" which the Supreme Court held was a sufficient basis for an in-court identification notwithstanding a prior invalid lineup; *Coleman v. Alabama*, 399 U.S. 1, 4-6, 90 S. Ct. 1999, 26 L. Ed.2d 387 (1970); and superior as well to the 20 to 30 second observation which this court held sufficient indelibly to sear the perpetrator's image in his victim's memory. *United States ex rel. Phipps v. Follette*, 428 F. 2d 912, 916 (2nd Cir. 1970).

## **2. Degree of attention.**

It is significant that the witness was no "casual observer" (see *Biggers*, p. 200) or bystander unaware that a crime was being committed (*United States ex rel. Phipps v. Follette*, *supra* 915). Rather, he was a trained police officer on an undercover narcotics assignment who was "motivated to make a careful observation of the perpetrator". *Ibid.* His contact with the seller was for the purpose of exposing him as a narcotics dealer and he was careful to form in his mind a definite image of the person with whom he was transacting his sale.

## **3. Accuracy of the description.**

Officer Glover's description of his seller as given to Detective D'Onofrio minutes after the transaction was of a black male, five feet eleven, heavy build, black hair in an Afro style, with high cheek bones. In addition, he was able to describe some of the clothing worn. To say the least, the description is a rather detailed one. That it was in all respects accurate may be measured by the absence of any testimony from either Brathwaite or his wife, both of whom testified during the trial, that his physical characteristics on the date of the offense were unlike those described. Moreover and aside from the improper procedure, the description was sufficiently accurate to satisfy

Detective D'Onofrio of the seller's identity, not to mention the jury to which such evidence was directed. *United States ex rel. Gonzalez v. Zelker, supra* 802.

#### **4. Level of certainty at confrontation.**

Regardless of the invalidity of the photo identification procedure there is no dispute that the photograph received in evidence during the trial (State's Exhibit 2) was of the petitioner. The degree of Officer Glover's certainty in identifying him as the seller is best illustrated by his testimony:

"Q. And there is no question, then, I take it, that the photograph is of the person from whom you made the buy, is that what you said? A. There is no question whatsoever.

Q. And that would be the person identified as the accused in this case sitting at the counsel table? A. Yes, it would be." Tr. p. 38.

And later:

"Q. Have you had occasion to see this accused since that date, since May 5th? A. No, I have not.

Q. You hadn't seen him before? A. No, I had not.

Q. I think you said there is no doubt whatsoever in your mind that this is the same person from whom you made the purchase? A. No, there isn't." Tr. pp. 41-42.

#### **5. Length of time between crime and confrontation.**

The interval of eight months between the date of the offense and the in-court identification is not so long as to be unreasonable per se. Furthermore, the fact that the witness was a trained police officer lends further credence to the reliability of the testimony and weakens any claim that the passage of time dimmed his memory.

Other jurisdictions have held that even longer intervals do not violate the due process requirements of *Biggers*;

*United States v. King*, 461 F.2d 152, 149 U.S. App. D.C. 61 (1972) (14 months);

*United States v. Hurt*, 476 F.2d 1164, 155 U.S. App. D.C. 217 (1973) (12 months);

*Souza v. Howard*, 488 F.2d 462 (1st Cir. 1973) cert. den. 417 U.S. 933 (about a year);

*United States v. Wilcox*, 507 F.2d 364 (4th Cir. 1974) (9 months);

and Brathwaite's assertion (Appellant's Brief, p. 29) that the interval "severely undermines the reliability of the in-court identification" is totally unsupported by anything in the trial record.

**B. Other evidence which connected the petitioner with the crime:**

The petitioner has asserted that there was no other "tangible or intangible evidence which corroborated Glover's testimony" (Appellant's Brief, p. 25). The statement is factually inaccurate and carefully avoids mention of Brathwaite's own testimony, to wit: that he had on many occasions prior to the date of the crime visited a female friend of his wife who occupied an apartment on the third floor of a building at No. 201 Westland Street, Hartford; and that he was in fact placed under arrest while visiting in this same apartment.

When considered in the context of Officer Glover's testimony that the narcotics transaction took place at the doorway to an apartment on the third floor of No. 201 Westland Street and that when the door opened a black male was observed standing in front of a black female, the evidence is not without inferential significance in placing Brathwaite at the scene of the crime.



## ARGUMENT

## II

**The quality of representation afforded the petitioner by his trial counsel is not an issue properly before this Court.**

In addition to dogmatic expressions of opinion and references to matters not a part of the record, a significant portion of the petitioner's brief [pp. 21-23, 25, 28, 30 (N. 7)] is devoted to criticizing and second guessing the conduct of his defense as presented by his counsel during the trial. Although such reaction is not uncommon among disappointed criminal defendants, it should play no role in this appeal. While avoiding use of the term, it is clear that Brathwaite is claiming that he received ineffective assistance from his trial counsel. As the District Court pointed out (Appellant's Appendix, Exhibit 1, p. 4), the claim has never been raised in the State court. Having failed to exhaust his state remedies as required [28 U.S.C. Sec. 2254 (b)(c)], the District Court refused to consider the claim, and the same veiled claim as made to this Court should be similarly rejected.

*Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509,  
30 L. Ed.2d 438 (1971);  
*United States ex rel. Bagley v. LaVallee*, 332 F.2d  
890 (2nd Cir. 1964);  
*Meadows v. Beto*, 455 F.2d 985 (5th Cir. 1972).

### Conclusion

In spite of the invalidity of the photographic identification procedure, the identification of the petitioner was under all of the circumstances reliable and the in-court identification testimony valid. The judgment of the District Court dismissing the petition should be affirmed.

Respectfully submitted,

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State of New York,  
County of New York,  
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 21st  
day of August, 1975, he served two copies of the  
Respondent-Appellee's Brief on Martha Stone, Esq. and  
on David Golub, Esq.

the attorney for the Appellant  
by depositing the same, properly enclosed in a securely sealed  
post-paid wrapper, in a Branch Post Office regularly maintained  
by the Government of the United States at 90 Church Street, Borough  
of Manhattan, City of New York, directed to said attorney s at  
No. 1800 Asylum Avenue, West Hartford, ( ) ~~Conn~~,  
Connecticut 06117,  
that being the address designated by the m for that purpose upon  
the preceding papers in this action.

*David F. Wilson*

Sworn to before me this

21st day of August, 1975.

*Courtney J. Brown*

COURTNEY J. BROWN  
Notary Public, State of New York  
No. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1976







